

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 15, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHEILA M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-cv-03063-SMJ

**ORDER DENYING MOTION TO
SUPPLEMENT, GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT, AND
DENYING COMMISSIONER'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court, without oral argument, are Plaintiff's Motion to Supplement the Record, ECF No. 13, and the parties' cross-motions for summary judgment, ECF Nos. 20, 24. Plaintiff Sheila M. appeals the Administrative Law Judge's (ALJ) denial of her application for Supplemental Security Income (SSI) and Disability Insurance (DI) benefits. Plaintiff alleges the ALJ (1) improperly failed to include relevant evidence, (2) improperly discounted or dismissed medical opinions, and (3) failed to fully credit Plaintiff's testimony. ECF No. 20. Plaintiff also separately moved to supplement the administrative record (AR). ECF No. 13. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision and opposes supplementing the AR. ECF Nos. 16, 19.

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MOTION FOR SUMMARY JUDGMENT, AND DENYING
COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT – 1

98, who again denied Plaintiff benefits on March 17, 2016. AR 433–55. Plaintiff again appealed to this Court, which granted the parties’ stipulated motion for remand to the Commissioner for further proceedings. AR 881–84. A third hearing was held before ALJ C. Howard Prinsloo. AR 831–52. The ALJ³ denied Plaintiff benefits on January 25, 2019. AR 806–30. Plaintiff again appealed to this Court under 42 U.S.C. §§ 405(g), 1383(c)(3). ECF No. 1.

DISABILITY DETERMINATION

A “disability” is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The decision-maker uses a five-step sequential evaluation process to determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

Step one assesses whether the claimant is engaged in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision-maker proceeds to step two.

Step two assesses whether the claimant has a medically severe impairment or

³ Reference to “the ALJ” is a reference to ALJ Prinsloo.

1 combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant
2 does not, the disability claim is denied. If the claimant does, the evaluation proceeds
3 to the third step.

4 Step three compares the claimant's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to preclude
6 substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1,
7 416.920(d). If the impairment meets or equals one of the listed impairments, the
8 claimant is conclusively presumed to be disabled. If the impairment does not, the
9 evaluation proceeds to the fourth step.

10 Step four assesses whether the impairment prevents the claimant from
11 performing work he has performed in the past by examining the claimant's residual
12 functional capacity, or RFC. 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
13 is able to perform his previous work, he is not disabled. If the claimant cannot
14 perform this work, the evaluation proceeds to the fifth step.

15 Step five, the final step, assesses whether the claimant can perform other
16 work in the national economy in view of his age, education, and work experience.
17 20 C.F.R. §§ 404.1520(f), 416.920(f); *see Bowen v. Yuckert*, 482 U.S. 137 (1987).
18 If the claimant can, the disability claim is denied. If the claimant cannot, the
19 disability claim is granted.

20 The burden of proof shifts during this sequential disability analysis. The

1 claimant has the initial burden of establishing a prima facie case of entitlement to
2 disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). The
3 burden then shifts to the Commissioner to show (1) the claimant can perform other
4 substantial gainful activity, and (2) that a “significant number of jobs exist in the
5 national economy,” which the claimant can perform. *Kail v. Heckler*, 722
6 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if his impairments are
7 of such severity that he is not only unable to do his previous work but cannot,
8 considering her age, education, and work experiences, engage in any other
9 substantial gainful employment that exists in the national economy. 42 U.S.C.
10 §§ 423(d)(2)(A), 1382c(a)(3)(B).

11 ALJ FINDINGS

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
13 activity since the alleged onset date. AR 812.

14 At step two, the ALJ found that Plaintiff had seven medically determinable
15 severe impairments: fibromyalgia, degenerative disc disease, obesity, affective
16 disorder, anxiety, pain disorder, and borderline personality disorder. *Id.*

17 At step three, the ALJ found that Plaintiff did not have an impairment or
18 combination of impairments that met or medically equaled the severity of a listed
19 impairment. *Id.* at 812–13.

20 At step four, the ALJ found that Plaintiff had an RFC sufficient to perform

1 light work as defined in 20 C.F.R. §§ 404.1567(b), 416.967(b) with the following
2 limitations: “[Plaintiff] is limited to simple, routine, repetitive tasks. She can have
3 only occasional and superficial interaction with coworkers and supervisors. She
4 should not work with the general public. She would need to work independently as
5 opposed to working in a team.” *Id.* at 814.

6 In reaching this determination, the ALJ gave great weight to the opinion of
7 medical expert Kenneth Asher, Ph.D. *Id.* at 818. The ALJ gave some weight to the
8 opinions of Jay Toews, Ed.D., Emma Billings, Ph.D., and Gregory Sawyer, Ph.D.,
9 as well as to the opinion of Faulder Colby, Ph.D. that Tae-Im Moon, Ph.D.’s opinion
10 is not supported. *Id.* at 819–20. The ALJ gave little weight to the opinions of Dr.
11 Moon, Russell Maier, M.D., Nancy Schwarzkopf, A.R.N.P., and Sean Mee, Ph.D.
12 *Id.* at 820. The ALJ gave little to no weight to various Global Assessment of
13 Functioning (GAF) scores, including a GAF score assessed by Debbi Spitler, PA-C.
14 *Id.*

15 At step five, the ALJ found Plaintiff could perform past relevant work as a
16 cleaner and an agricultural produce sorter. *Id.*

17 STANDARD OF REVIEW

18 The Court must uphold an ALJ’s determination that a claimant is not disabled
19 if the ALJ applied the proper legal standards and there is substantial evidence in the
20 record, considered as a whole, to support the ALJ’s decision. *Molina v. Astrue*, 674

1 F.3d 1104, 1110 (9th Cir. 2012) (citing *Stone v. Heckler*, 761 F.2d 530, 531 (9th
 2 Cir. 1985)). “Substantial evidence ‘means such relevant evidence as a reasonable
 3 mind might accept as adequate to support a conclusion.’” *Id.* at 1110 (quoting
 4 *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). This
 5 must be more than a mere scintilla but may be less than a preponderance. *Id.*
 6 at 1110–11 (citation omitted). If the evidence supports more than one rational
 7 interpretation, the Court must uphold an ALJ’s decision if it is supported by
 8 inferences reasonably drawn from the record. *Id.*; *Allen v. Heckler*, 749 F.2d 577,
 9 579 (9th Cir. 1984). The Court will not reverse an ALJ’s decision if the errors
 10 committed by the ALJ were harmless. *Molina*, 674 F.3d at 1111 (citing *Stout v.*
 11 *Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th Cir. 2006)). “[T]he burden
 12 of showing that an error is harmful normally falls upon the party attacking the
 13 agency’s determination.” *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

14 ANALYSIS

15 **A. Plaintiff has not shown the Court has authority to amend the** 16 **administrative record on review**

17 Plaintiff moves the Court to supplement the administrative record or
 18 alternatively remand under sentence six of 42 U.S.C. § 405(g). ECF No. 13.
 19 Specifically, Plaintiff gave the ALJ notice that certain records would be filed later
 20 than five days before the hearing, but that the ALJ refused to enter these documents

1 into the administrative record when Plaintiff submitted them. *Id.* The Commissioner
2 argues that the Court is without authority to supplement the administrative record
3 and that remand under sentence six of 42 U.S.C. § 405(g) is inappropriate. ECF
4 No. 16.

5 Under sentence six of 42 U.S.C. § 405(g), the Court “may at any time order
6 additional evidence to be taken before the Commissioner of Social Security, but
7 only upon a showing that there is new evidence which is material and that there is
8 good cause for the failure to incorporate such evidence into the record in a prior
9 proceeding.” 42 U.S.C. § 405(g). However, this evidence is not “new” as it was
10 presented to the ALJ, who explicitly declined to include it in the administrative
11 record. AR 809–10.

12 The Commissioner is correct that Plaintiff has cited no legal authority to
13 support supplementing the administrative record on review. Indeed, case law
14 suggests the Court lacks such authority. *See Wetzler v. Colvin*, No. C15-1074-BHS-
15 DWC, 2016 WL 4376635, at *2 (W.D. Wash. July 11, 2016), *report and*
16 *recommendation adopted*, No. C15-1074-BHS, 2016 WL 4363311 (W.D. Wash.
17 Aug. 16, 2016). Instead of presenting legal authority to supplement the record on
18 review, Plaintiff presents various arguments as to why the ALJ’s refusal to consider
19 the documents was in error. ECF No. 13 at 2–5. As Plaintiff appears to implicitly
20 recognize—by framing the motion in terms the ALJ’s error in refusing to consider

1 these records, and by raising this as a ground for relief in Plaintiff's Motion for
 2 Summary Judgment—this argument is more appropriately addressed as an asserted
 3 claim of error warranting remand. As such, the motion to supplement the record is
 4 denied.

5 **B. The ALJ erred in refusing to consider the report of Dr. Adlaw, but did**
 6 **not err in refusing to consider medical records not clearly disclosed in**
 7 **Plaintiff's letter regarding additional records**

8 Plaintiff contends the ALJ's failure to accept late-filed evidence was in error
 9 because Plaintiff timely submitted a notice regarding the late filing of these
 10 documents. ECF No. 20 at 3. The Commissioner argues the ALJ properly excluded
 11 this evidence because the notice was untimely. ECF No. 24 at 3.

12 20 C.F.R. §§ 404.935(a) and 416.1435(a) require claimants to “make every
 13 effort to ensure that the administrative law judge receives all of the evidence and
 14 must inform [the Commissioner] about or submit any written evidence . . . no later
 15 than 5 business days before the date of the scheduled hearing.” If a claimant submits
 16 written evidence later than five business days before the date of her hearing, “the
 17 administrative law judge may decline to consider or obtain the evidence, unless”
 18 the claimant establishes one of several enumerated circumstances. 20 C.F.R.
 19 §§ 404.935(b), 416.1435(b). This includes where “[s]ome other unusual,
 20 unexpected, or unavoidable circumstance beyond [the claimant's] control prevented

1 [her] from informing [the Commissioner] about or submitting the evidence earlier,”
2 for example, that the claimant “actively and diligently sought evidence from a
3 source and the evidence was not received or was received less than 5 business days
4 prior to the hearing.” 20 C.F.R. §§ 404.935(b)(3), 416.1435(b)(3).

5 On November 21, 2018, Plaintiff submitted a letter to the ALJ informing the
6 ALJ that “claimant will have two appointments the week of her hearing” and that
7 she “[would] be requesting records from Washington Physicians Clinic and
8 Washington Neurology Clinic as soon as the appointments are completed.”
9 AR 1003. This letter also stated that Plaintiff “also requested and [sic] Medical
10 Report Form from Community Health of Central Washington but have not yet
11 received it.” *Id.* The ALJ refused to admit records from Cascade Summit Physical
12 Therapy in 2012 and 2013, Washington Neurology in October and November 2018,
13 and Dr. Rana Aldaw from October 2018. AR 810. The ALJ noted that Plaintiff’s
14 November 21, 2018 letter “was concerning appointments that were occurring later
15 that week as well as a Medical Report Form from Community Health of Central
16 Washington (24E). The representative made no mention of the 3 late submissions
17 noted above either in this letter or at the hearing.” *Id.* Plaintiff asserts the ALJ’s
18 failure to consider the records from Washington Neurology and the October 2018
19 medical report from Dr. Aldaw was in error. ECF No. 20 at 4.

20 Contrary to the Commissioner’s assertion, the ALJ did not find that

1 Plaintiff's notice was untimely, but rather that Plaintiff's notice failed to inform the
2 ALJ of certain evidence Plaintiff later submitted. AR 809–10. Even so, Plaintiff's
3 notice was ambiguous as to whether Plaintiff was seeking records from Washington
4 Physicians Clinic and Washington Neurology Clinic solely as to the appointments
5 on the week of the hearing described in the notice or as to an unknown volume of
6 more extensive records. *See* AR 1003 (“We would like to inform you that this
7 claimant will have two appointments the week of her hearing. We will be requesting
8 records from Washington Physicians Clinic and Washington Neurology Clinic as
9 soon as the appointments are completed.”). The ALJ interpreted this notice as
10 informing the ALJ only of the submission of records of those appointments and
11 found that records from prior appointments were not included in the notice. AR 810.
12 Plaintiff's notice was not specific as to the records Plaintiff would be seeking from
13 Washington Physicians Clinic and Washington Neurology Clinic, and the Court
14 will not overturn the ALJ's interpretation of the ambiguous notice as to these
15 records. *Cf. Vickie M. v. Saul*, Case No. 2:19-cv-01740-GJS, 2020 WL 1676624, at
16 *4 (C.D. Cal. April 6, 2020).

17 However, Plaintiff's notice *was* clear that she had requested, but not yet
18 received, a Medical Report Form from Community Health of Central Washington.
19 AR 1003. Plaintiff asserts Dr. Adlaw had been treating Plaintiff at Community
20 Health of Central Washington. ECF No. 20 at 4. Although the report from Dr.

1 Adlaw attached to Plaintiff's Motion to Supplement the Record does not contain
2 any reference to Community Health of Central Washington, *see* ECF No. 13-2, the
3 address listed on the report is the same Plaintiff listed when giving the ALJ notice
4 of the Community Health of Central Washington report, *see* AR 1004; ECF
5 No. 13-2 at 3. As such, the Court finds Plaintiff informed the ALJ within five days
6 of the November 28, 2018 hearing of this record and the ALJ's failure to consider
7 it was in error.

8 Further, this error appears harmful because Dr. Adlaw opined that Plaintiff
9 would miss an average of two days of work per month. ECF No. 13-2 at 3. The
10 medical experts testifying at two of the hearings before ALJs testified that this
11 would result in Plaintiff losing her position. AR 68, 495. On remand, the ALJ should
12 consider Dr. Adlaw's report.

13 **C. The ALJ did not err in discounting the opinions of Dr. Billings,**
14 **Dr. Moon, Dr. Maier, and Nancy Schwartzkopf or interpreting Dr.**
15 **Asher's opinion, harmlessly erred in assessing Dr. Colby's opinion, but**
harmfully erred in failing to address Ms. Spitler's opinion

16 Plaintiff argues the ALJ erred by giving only some weight to the opinion of
17 Emma Billings, Ph.D., giving little weight to the opinion of Dr. Tae-Im Moon,
18 Ph.D. but some weight to the opinion of Faulder Colby, Ph.D. that Dr. Moon's
19 opinion is not supported, giving little weight to the opinions of Russell Maier, M.D.
20 and Nancy Schwarzkopf, A.R.N.P., and giving little to no weight to a GAF score

1 assessed by Debbi Spitler, PA-C. ECF No. 20 at 6–20. Plaintiff also asserts the ALJ
2 erred in giving great weight to the opinion of Dr. Asher yet failing to include in the
3 RFC the limitations Dr. Asher described. *Id.* at 12. The Commissioner argues the
4 ALJ reasonably weighed each of these medical opinions. ECF No. 24 at 9–17.

5 For SSI appeal purposes, there are three types of physicians: “(1) those who
6 treat the claimant (treating physicians); (2) those who examine but do not treat the
7 claimant (examining physicians); and (3) those who neither examine nor treat the
8 claimant [but who review the claimant’s file] (non-examining physicians).”
9 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001). Generally, a
10 treating physician’s opinion carries more weight than an examining physician’s,
11 and an examining physician’s opinion carries more weight than a non-examining
12 physician’s. *Id.* at 1202. “In addition, the regulations give more weight to opinions
13 that are explained than to those that are not, and to the opinions of specialists
14 concerning matters relating to their specialty over that of nonspecialists.” *Id.*

15 If a treating or examining physician’s opinion is uncontradicted, the ALJ may
16 reject it only for “clear and convincing reasons that are supported by substantial
17 evidence.” *Bayliss*, 427 F.3d at 1216. “If a treating or examining doctor’s opinion
18 is contradicted by another doctor’s opinion, an ALJ may only reject it by providing
19 specific and legitimate reasons that are supported by substantial evidence.” *Id.*
20 (citing *Lester*, 81 F.3d 821, 830–31).

1 **1. The ALJ did not err in discounting Dr. Billings’ opinion**

2 The ALJ gave some weight to the opinions of Dr. Billings, who examined
3 Plaintiff in 2012, and agreed with Dr. Billings’ assessment that Plaintiff’s
4 limitations were primarily due to social impairment, although the ALJ discounted
5 Dr. Billings’ assessment of marked limitations in several social domains because
6 this assessment was not supported. AR 819. The ALJ discounted this latter portion
7 of Dr. Billings’ assessment on the grounds that Plaintiff was “able to maintain
8 adequate behavior to attend and complete her appointments” and that Plaintiff was
9 able to maintain a relationship with her son, a close friend, and those in online
10 groups. *Id.*

11 Plaintiff asserts the ALJ did not give specific and legitimate reasons
12 supported by substantial evidence for discounting Dr. Billings’ opinion and that the
13 ALJ’s RFC determination did not incorporate Dr. Billings’ specific findings related
14 to Plaintiff’s argumentativeness and belligerence. ECF No. 20 at 7–8. Plaintiff notes
15 that interactions with Defendant’s son and a close friend do not reflect on Plaintiff’s
16 ability to maintain relationships necessary for employment and that by 2018,
17 Plaintiff was no longer a member of the online group the ALJ noted. *Id.*

18 However, the ALJ’s opinion reflects a lengthy discussion of Plaintiff’s
19 conduct in appointments and interviews from March 2011 to July 2018 and a
20 determination that “[t]hough the records at times show the claimant to be irritable,

1 this is generally in the context of her providers not doing what she wants them to
2 do such as exploring a diagnosis she has given herself based on internet research.”
3 AR 816–18. The ALJ noted, in discounting Dr. Billings opinion, that “the records
4 show that the claimant is often irritable or argumentative,” but determined that
5 Plaintiff’s RFC adequately accounted for the level of irritability and belligerence
6 by limiting her social interactions. AR 819. That Dr. Billings’ opinion was
7 inconsistent with the record as a whole was a specific and legitimate reason for
8 rejecting her opinion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007)
9 (“[F]actors relevant to evaluating any medical opinion include the amount of
10 relevant evidence that supports the opinion, the quality of the explanation provided
11 in the opinion, and the consistency of the medical opinion with the record as a
12 whole”). The ALJ supported this finding when discussing the medical records, and
13 reading the ALJ’s decision as a whole, the Court finds he provided specific and
14 legitimate reasons supported by substantial evidence for discounting Dr. Billings’
15 opinion. *See* AR 816–18; *Bayliss*, 427 F.3d at 1216.

16 **2. The ALJ did not err in discounting Dr. Moon’s opinion**

17 The ALJ gave little weight to the opinion of Dr. Tae-Im Moon, Ph.D., who
18 examined Plaintiff. AR 819–20. The ALJ provided three reasons for discounting
19 Dr. Moon’s opinion: (1) that Dr. Moon’s opinion pertained to both Plaintiff’s
20 physical and mental health, but that Plaintiff’s physical impairments were outside

1 the scope of Dr. Moon’s examination, (2) that Dr. Moon did not provide a specific
2 assessment of the degree of Plaintiff’s impairment, and (3) that nothing in Dr.
3 Moon’s assessment supported a determination that Plaintiff would be unable to do
4 any work. *Id.*

5 Dr. Moon specifically found that Plaintiff’s “symptoms of anxiety and
6 depression, along with her multiple medical issues related to fibromyalgia would
7 significantly interfere with her ability to work.” AR 703. This opinion blended
8 Plaintiff’s psychological symptoms, which Dr. Moon was qualified to assess, with
9 Plaintiff’s physical symptoms, which it does not appear Dr. Moon was qualified to
10 assess. Although an ALJ may not reject a doctor’s opinion concerning medical
11 limitations solely on the grounds they are outside the doctor’s area of expertise,
12 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987), the ALJ may consider the
13 physician’s area of expertise in determining the weight to which opinion their
14 opinion is entitled, 20 C.F.R. §§ 416.926(c)(5), 404.1527(c)(5). Here, the ALJ did
15 not solely rely on Dr. Moon’s area of expertise in giving little weight to Dr. Moon’s
16 opinion.

17 The ALJ was correct in noting that Dr. Moon did not state the degree of
18 Plaintiff’s impairments, but generally described her impairments, such as that “[s]he
19 has difficulty focusing and remembering, which would interfere with learning new
20 tasks” and that “[r]eliability is likely to be an issue at work, as well as getting along

1 with co-workers, secondary to anxiety being around people.” AR 819–20. eThe ALJ
2 specifically noted that he had considered Plaintiff’s social impairments raised by
3 Dr. Moon and “fully accommodated them by limiting the claimant to occasional
4 contact with coworkers and supervisors, and no work with the public.” AR 820.
5 Thus, the ALJ did not entirely discount Dr. Moon’s opinions, and, together with the
6 determination that Dr. Moon’s assessment did not support his findings, provided
7 specific and legitimate reasons for declining to give more weight to the opinion. *See*
8 *Lingenfelter*, 504 F.3d at 1042.

9 Plaintiff challenges the ALJ’s statement that Dr. Moon’s mental status
10 findings for Plaintiff were “largely normal” because Plaintiff appeared tense and
11 anxious during the evaluation and because she was unable to correctly perform two
12 of the evaluations. ECF No. 20 at 11. However, the ALJ’s description that Plaintiff
13 “performed generally well on mental status testing,” and that the mental status
14 findings were “largely normal,” is not inconsistent with Plaintiff’s anxious
15 appearance or her failure to complete two of a series of evaluations on which she
16 was otherwise successful. AR 820, 704–05.

17 **3. The ALJ harmlessly erred in weighing Dr. Colby’s opinion**

18 The ALJ gave some weight to the opinion of Faulder Colby, Ph.D., whom
19 the ALJ wrote reviewed Dr. Moon’s opinion and determined that it was not
20 supported. AR 820. Plaintiff asserts this was in error because Dr. Colby did not find

1 make such a finding as to Dr. Moon's opinion. ECF No. 20 at 10.

2 A review of Dr. Colby's assessment confirms that Dr. Colby did not find Dr.
3 Moon's opinions were unsupported, but rather that Dr. Moon's rule-out diagnosis
4 would not provide a basis for SSI and that anxiety disorder "would likely not qualify
5 as a serious mental illness." AR 706. As such, the ALJ's reliance on this opinion to
6 support his determination that Dr. Moon's opinion was unsupported was in error.
7 That aside, Dr. Colby's opinion does not include any assessment of Plaintiff's
8 mental or physical limitations, and the ALJ noted as much. AR 706, 820. The ALJ
9 also specifically only gave weight to the opinion "noting that Dr. Moon's opinion
10 is not supported." AR 820. Even removing Dr. Colby's opinion as a basis for
11 discounting Dr. Moon's opinion, the ALJ still provided specific and legitimate
12 reasons supported by substantial evidence for rejecting that opinion. As such, the
13 ALJ's error in assigning weight to Dr. Colby's opinion was harmless.

14 **4. The ALJ did not improperly discount any of Dr. Asher's opinions**

15 The ALJ gave "great weight" to the opinions of Dr. Kenneth Asher, Ph.D.,
16 and provided no reason for discounting any of Dr. Asher's opinions. AR 818–19.
17 Plaintiff asserts that, although the ALJ stated that he gave great weight to
18 Dr. Asher's opinions, the ALJ failed to include the limitations Dr. Asher described
19 when determining Plaintiff's RFC. ECF No. 20 at 12. The Commissioner asserts
20 that the Court must defer to the ALJ's interpretation of Dr. Asher's opinion. ECF

1 No. 24 at 13–14.

2 Plaintiff cites to portions of the hearing transcript where Dr. Asher discussed
3 Plaintiff’s difficulty in maintaining appropriate behavior in a work environment. *Id.*
4 at 11. Specifically, Dr. Asher stated that someone with Plaintiff’s limitations in
5 terms of belligerence, hostility, and aggressiveness “sometimes” “would not
6 succeed, would have difficulty” in the workplace. AR 483. Dr. Asher noted that
7 these limitations would not be addressed by a formal workplace accommodation,
8 but rather “more of the informal adjustment and accommodation that human beings
9 make.” *Id.* Dr. Asher also noted that Plaintiff would handle stressful situations
10 “slightly better than if she were . . . truly in the marked range.” *Id.* at 484. Plaintiff
11 uses Dr. Asher’s statement that Plaintiff “sometimes . . . would not succeed, would
12 have difficulty” to argue that Dr. Asher’s opinion supports a finding that Plaintiff is
13 unemployable. Specifically, Plaintiff relies on the testimony of the vocational
14 expert that a person who engaged in denial, blaming others, or recrimination of a
15 supervisor in a third of interactions would not be employable. ECF No. 20 at 12
16 (citing AR 496). However, nothing in Dr. Asher’s opinions clearly states that
17 Plaintiff would engage in this behavior in any specific portion of her interactions,
18 much less a third of her workplace interactions. *See* AR 483–84.

19 Thus, the Court cannot conclude that the ALJ improperly discounted Dr.
20 Asher’s opinions. The Court is bound to accept the ALJ’s interpretation of Dr.

1 Asher's opinions where the interpretation is supported by inferences reasonably
2 drawn from the record. *See Molina*, 674 F.3d at 1111 ("Even when the evidence is
3 susceptible to more than one rational interpretation, we must uphold the ALJ's
4 findings if they are supported by inferences reasonably drawn from the record.").
5 Plaintiff has failed to come forward with evidence that the ALJ's interpretation of
6 Dr. Asher's opinions were not supported by inferences reasonably drawn from the
7 record and, as such, has not shown that the ALJ erred in assessing those opinions.

8 **5. The ALJ did not err in weighing Dr. Maier's opinions**

9 The ALJ gave little weight to the opinions of Russell Maier, M.D. on the
10 bases that Dr. Maier gave "no significant support for the limitations that he opines,"
11 that his treatment notes from the same day refute the limitations he describes, and
12 that "physical examination findings showed some partially limited range of motion,
13 but do not document such drastic impairment as to support the limitations" in Dr.
14 Maier's opinions. AR 820. These are specific and legitimate reasons supported by
15 substantial evidence. *See Bayliss*, 427 F.3d at 1216.

16 Dr. Maier opined that Plaintiff was severely limited and unable to meet the
17 demands of even sedentary work, and specifically that she was markedly limited in
18 her ability to sit, stand, walk, lift, carry, handle, push, pull, reach, stoop, and crouch.
19 AR 1021–22. This opinion included a description of Plaintiff's chief complaints,
20 including stiffness, digestive problems, fevers, cramps, muscle spasms, pain after

1 walking or exercising that can last for days, and pain the day after lifting. AR 1020.
2 Dr. Maier's findings also included a range of joint motion evaluation chart.
3 AR 1022–23. The ALJ correctly noted that the opinions include a note that
4 Plaintiff's fibromyalgia was well-controlled on Lyrica. AR 1023.

5 Plaintiff asserts Dr. Maier was Plaintiff's treating physician and that the ALJ
6 was required to consider his statements "in the context of the overall diagnostic
7 picture he draws." ECF No. 20 at 13 (quoting *Holohan v. Massanari*, 246
8 F.3d 1195, 1205 (9th Cir. 2001)). However, the record does not contain other
9 treatment notes from Dr. Maier, and the records Plaintiff cites in attempting to
10 undermine the ALJ's opinion come from the records of other physicians and
11 therapists. ECF No. 20 at 14 (citing AR 707, 764, 768, 772, 1033 & 1058). Thus,
12 the ALJ assessed the sole record on which the ALJ could rely to assess Dr. Maier's
13 diagnostic opinions and found it did not support the limitations Dr. Maier assessed.⁴
14 That Dr. Maier's opinion was insufficiently supported constitutes a basis for
15 discounting his opinion. *See Lingenfelter*, 504 F.3d at 1042.

16 Moreover, the ALJ found Dr. Maier's treatment notes from the same date
17 contradicted his findings because the treatment records reflect that Plaintiff's
18

19 ⁴ Plaintiff also raises an argument related to the possible side effect of weight gain
20 but does not clearly articulate why this would be a basis for rejecting the ALJ's
determination as to Dr. Maier's opinion. ECF No. 20 at 14.

1 fibromyalgia is well controlled on Lyrica. AR 820. Plaintiff identifies multiple
2 records where Plaintiff indicated Lyrica was insufficient to manage her chronic
3 pain. *See* AR 707 (explaining Lyrica was only effective for 4 to 5 hours), 764
4 (reporting ongoing pain on maximum dose of Lyrica), 768 (explaining Lyrica was
5 not as helpful as it had been and helps most with stomach complaints), 772
6 (explaining Lyrica helps but does not mitigate all pain). However, none of these
7 records are from Dr. Maier's treatment notes. Thus, the Court finds the ALJ
8 articulated a sufficient basis for discounting Dr. Maier's opinion. *See Connett v.*
9 *Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003) (holding that ALJ properly rejected
10 physician's conclusions that were not supported by physician's own treatment
11 notes).

12 Finally, the ALJ noted that "physical examination findings showed some
13 partially limited range of motion, but do not document such drastic impairment as
14 to support the limitations" in Dr. Maier's opinion. AR 820. Plaintiff argues that this
15 reflects a misunderstanding of Plaintiff's condition, which Plaintiff asserts is
16 complex and characterized mainly by pain. ECF No. 20 at 14–15 (citing *Benecke v.*
17 *Barnhart*, 379 F.3d 587, 589–90 (9th Cir. 2004)). Rejecting Dr. Maier's opinion
18 based on minor limits on Plaintiff's range of motion was in error because normal
19 physical examination results are compatible with fibromyalgia. *See Revels v.*
20 *Berryhill*, 874 F.3d 648, 666 (9th Cir. 2017). However, even rejecting this ground

1 for discounting Dr. Maier's opinion, the ALJ articulated sufficient alternative
2 reasons to support giving Dr. Maier's opinion little weight, and the error was
3 therefore harmless.

4 **6. The ALJ did not err in weighing Nancy Schwarzkopf's opinion**

5 The ALJ adopted the 2016 ALJ decision giving little weight to the opinion
6 of Nancy Schwarzkopf, A.R.N.P. AR 820. In 2016, ALJ Martz gave little weight to
7 Schwarzkopf's opinion that Plaintiff was severely limited and unable to meet the
8 demands of even sedentary work. AR 447. Plaintiff asserts the ALJ erred in doing
9 so because he "stated the 2015 district court had upheld the 2012 ALJ decision
10 regarding the physical evidence and simply adopted the 2016 reasoning to give
11 Schwartzkopf's opinion 'little weight.'" ECF No. 20 at 16. The Commissioner
12 asserts Plaintiff should be prohibited from relitigating this issue because the district
13 court previously determined that the ALJ Martz did not err in her 2012 decision as
14 to Plaintiff's physical impairments. ECF No. 24 at 15.

15 Courts are generally prohibited from considering an issue that has already
16 been decided by that same court or a higher court in the same case under the law of
17 the case doctrine. *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). "The doctrine
18 is concerned primarily with efficiency, and should not be applied when the evidence
19 on remand is substantially different, when the controlling law has changed, or when
20 applying the doctrine would be unjust." *Id.* (citing *Merritt v. Mackey*, 932

1 F.2d 1317, 1320 (9th Cir. 1991)).

2 Both parties are incorrect that the 2016 or 2019 ALJ decisions simply adopted
3 the 2012 findings to reject Schwartzkopf's opinion. Neither decision revisited the
4 physical impairment findings from Plaintiff's alleged onset date through the 2012
5 ALJ decision, which is in accordance with the law of the case doctrine. ALJ Martz
6 rejected Schwarzkopf's opinion on the grounds that it was inconsistent with reports
7 of the efficacy of Lyrica in treating Plaintiff's symptoms and separately cited
8 post-2012 records in support of this finding. AR 442, 447. As such, the Court rejects
9 Plaintiff's argument that the 2016 and 2019 ALJ decisions were in error for relying
10 on the 2015 district court findings.

11 Plaintiff separately challenges the reasons put forth in the 2016 decision, later
12 adopted in the 2019 decision, for rejecting Schwartzkopf's opinion. ECF No. 20
13 at 16. ALJ Martz in 2016 assigned little weight to Schwartzkopf's opinion on the
14 following grounds: (1) that it was inconsistent with Plaintiff's longitudinal mental
15 health treatment and reports of the efficacy of Lyrica in treating Plaintiff's
16 symptoms, (2) that Schwarzkopf only evaluated Plaintiff on one occasion, and
17 (3) that examination findings based on Plaintiff's reports of pain were not supported
18 because the record reflects that Plaintiff exaggerates her pain. AR 446, 447. That
19 Schwartzkopf's opinions were inconsistent with the record was a specific and
20 legitimate reason for rejecting this opinion. *See Lingenfelter*, 504 F.3d at 1042.

1 **7. The ALJ erred in weighing the opinions of Debbi Spitler**

2 Plaintiff asserts the ALJ erred in failing to provide germane reasons for
3 giving less than full weight to the opinions of Debbi Spitler, PA-C. ECF No. 20 at
4 19. In the Court's 2015 opinion, the Court found that ALJ Martz had failed to
5 provide germane reasons for rejecting Ms. Spitler's assessments because her
6 opinions were largely consistent with the medical record and because she was not
7 an acceptable medical source.⁵ AR 550. The Court again ordered the ALJ to
8 reevaluate Ms. Spitler's opinion in its 2017 order remanding. AR 883. Despite this,
9 the ALJ only discussed GAF scores generally and did not address any of the
10 remaining content in Ms. Spitler's records or her findings in relation to the GAF
11 scores. As such, this failure was in violation of the Court's orders remanding and
12 was in error. *See Jeffries v. Wood*, 114 F.3d 1484, 1488 (9th Cir. 1997) ("[T]he
13 decision of an appellate court on a legal issue must be followed in all subsequent
14 proceedings in the same case"). On remand, the ALJ should specifically consider
15 Ms. Spitler's opinions related to the GAF score as well as the GAF score assigned.
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20 ⁵ Specifically, the Court's 2015 opinion assigned error for failing to consider Ms. Spitler's opinions as lay witness opinions. AR 550.

1 **D. On remand, the ALJ should consider whether Plaintiff’s testimony is**
 2 **consistent with the evidence in the record after properly weighing the**
 3 **opinions of Dr. Adlaw and Ms. Spitler**

4 Finally, Plaintiff assigns error to the ALJ’s decision to discount Plaintiff’s
 5 own subjective symptom testimony, raising six bases for the ALJ’s alleged error.
 6 ECF No. 20 at 20. The Commissioner contends the ALJ properly discounted
 7 Plaintiff’s symptom testimony. ECF No. 24 at 4.

8 Where a claimant presents objective medical evidence of impairments that
 9 could reasonably produce the symptoms complained of, an ALJ may reject the
 10 claimant’s testimony about the severity of his symptoms only for “specific, clear
 11 and convincing reasons.” *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014).
 12 The ALJ’s findings must be sufficient “to permit the court to conclude that the ALJ
 13 did not arbitrarily discredit claimant’s testimony.” *Tommasetti v. Astrue*, 533
 14 F.3d 1035, 1039 (9th Cir. 2008). General findings are insufficient. *Lester v.*
 15 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). In evaluating the claimant’s credibility,
 16 the “ALJ may weigh inconsistencies between the claimant’s testimony and his or
 17 her conduct, daily activities, and work record, among other factors.” *Bray*, 554 F.3d
 18 at 1227. The Court may not second guess the ALJ’s credibility findings that are
 19 supported by substantial evidence. *Tommasetti*, 533 F.3d at 1039.

20 As noted above, in accordance with the law of the case doctrine, neither the
 2016 nor the 2019 decision revisited the physical impairment findings from

1 Plaintiff's alleged onset date through the 2012 ALJ decision. *See Stacy*, 825 F.3d at
2 567 (9th Cir. 2016). As such, the Court rejects Plaintiff's argument that the ALJ
3 erred in relying on the 2012 district court decision.

4 The determination that there was "no significant change since" that decision
5 was based on the new evidence Plaintiff cites, which the Court would evaluate
6 based on evidence after the 2012 ALJ decision. However, because the ALJ erred in
7 refusing to accept Dr. Adlaw's medical opinion and failed to properly assess Ms.
8 Spitler's opinions, the Court cannot adequately review the ALJ's determination that
9 Plaintiff's subjective symptom testimony was "not entirely consistent with the
10 medical evidence and other evidence in the record." AR 815. As such, the ALJ
11 should reevaluate whether Plaintiff's testimony is inconsistent with the evidence in
12 the record after properly weighing the opinions of Dr. Adlaw and Ms. Spitler.

13 **E. Remand, rather than an award of benefits, is appropriate**

14 In light of the errors identified above, further proceedings are clearly
15 necessary. Though there is certainly substantial evidence to support Plaintiff's
16 entitlement to benefits, that conclusion is not "clear from the record." *Garrison*, 759
17 F.3d at 1019. Accordingly, the Court remands this matter to the ALJ for further
18 proceedings consistent with this Order, rather than simply awarding benefits.

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CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion to Supplement the Record, **ECF No. 13**, is **DENIED**.
2. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**.
3. The Commissioner's Motion for Summary Judgment, **ECF No. 24**, is **DENIED**.
4. The Clerk's Office shall **ENTER JUDGMENT** in favor of **PLAINTIFF** and thereafter **CLOSE** the file.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 15th day of April 2020.


SALVADOR MENDOZA, JR.
United States District Judge